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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BYRON CHARLES WALLACE, Defendant and Appellant.	C086158 (Super. Ct. No. 15F06533)

Defendant Byron Charles Wallace appeals a judgment entered after a jury verdict finding him guilty of two counts of oral copulation with a person under the age of 18 (counts one, two); two counts of penetration with a foreign object (counts three, four); annoying a minor (count five); unlawful contact or communication with a minor (count six); dissuading a witness (count seven); and three counts of unlawful sexual intercourse with a minor (counts eight, nine, ten). He argues insufficient evidence supports his convictions for unlawful sexual intercourse with M. Doe (the victim), and annoying a

minor. He also complains certain testimony that was stricken was so prejudicial that it violated his rights to "due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments and their California counterparts," requiring reversal. Finally, defendant requests this court independently review subpoenaed school records to determine whether the trial court erred in not releasing them.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We limit these facts to those necessary to determine defendant's contentions on appeal.

The People's Case

Jane Doe testified to her consensual, sexual relationship with defendant, a teacher at her high school, occurring during her senior year while she was 17 years old. During that relationship, they engaged in sexual intercourse more than five times. Defendant gave her a special number and e-mail to use for him, and they exchanged explicit sexual photos. After Jane graduated, she broke off their relationship, at least in part because she found defendant's requests that she buy him things unattractive. While at community college, Jane spoke with the victim, who confided in her about a past relationship with defendant. Jane spoke with Detective Mohammad Rafiq, in part inquiring about a reward for information concerning defendant, but never followed up on or collected that reward.

The victim testified to her consensual, sexual relationship with defendant, her math teacher and a supervisor of the Christians in Action Club, occurring during her senior year of high school while she was 17 years old. Defendant knew the victim was 17 years old. Initially, the victim had a mentor/mentee relationship with defendant, but this changed in the fall of her senior year. Defendant texted the victim using the term "baby" and later texted her that she "[brought] out the pimping in [him]." The victim

testified that in response to these texts, "I wasn't sure what to think or how to respond to it. I believe I did eventually respond to those texts, but I guess I wasn't sure what was going on." The content of the texting became more inappropriate, with defendant demanding that for their relationship to progress, the victim would have to prove she was a woman by doing womanly things. Starting in October, they exchanged provocative photos, including nude photos defendant took of himself.

The victim performed oral sex on defendant at least 10 times. Defendant inserted his fingers into the victim's vagina many times. The victim testified about two different attempts to have sexual intercourse. The first time defendant's penis touched the outer portion of the victim's private area, but he ultimately stopped after the victim reiterated that she was nervous and did not want to have sex. Approximately two weeks later, defendant and the victim again attempted sexual intercourse. The victim testified, "[W]e were attempting to have [intercourse], but it was too painful for me to continue." The victim instantly felt a sharp pain when defendant attempted to insert his penis into her vagina. The victim complained and asked defendant to stop. When asked whether there were any lasting effects from that attempt, the victim testified, "I felt some pain for some time after that and there was a little bit of blood."

The victim initially confided in her friends about her relationship with defendant, but eventually stopped telling them anything because it created problems. The victim also lied to school officials on more than one occasion, denying that she had an inappropriate relationship with defendant. The victim, having been tipped off by defendant, deleted incriminating messages from her phone prior to meeting with school officials. The victim also admitted to lying to members of law enforcement about her relationship with defendant, and had lied so many times that she could not keep track of everything she said in the past. She denied knowing how to fake a screen shot and later

clarified that she had created a fake text about ending her relationship with defendant to show friends who were upset about, and demanding an end to, that relationship.

The victim estimated that during the course of their relationship, she spent a total of $3,500 on gifts requested by defendant, who told her that "a woman spoils her man." The victim and her family filed a claim and later a lawsuit against the school district, which was motivated (at least in part) by her learning that defendant may have a relationship with another student.

Angela Vickers, M.D., testified as an expert concerning "treating sexual assault victims" including "forensic findings and knowledge of the female genitalia." She explained through reference to a diagram admitted into evidence the difference between the outside of female genitalia versus the inner parts, testifying that the labia majora (along with the top mons pubis and perineum) are the external genitalia and anything revealed by spreading the labia majora is part of the internal female genitalia.

Detective Mohammad Rafiq testified concerning his investigation of defendant's relationships with the victim and Jane Doe. The victim was evasive and admitted lying to him, but he did obtain a download of the contents of the victim's cell phone. He also interviewed Jane Doe, who eventually produced her old phone and allowed authorities to retrieve naked photos defendant sent her.

The Defense Case

Defendant did not testify in his defense, but he did present the testimony of several individuals who knew him and had never seen him act inappropriately towards a female student. Defendant's wife likewise testified she never saw defendant act inappropriately toward any female student, but conceded her opinion of him would change if it were proven that defendant had sent nude photos of himself to an underage girl.

After the jury began deliberations, defendant moved to reopen evidence to impeach the victim with information received as a result of a subpoena on the day of closing argument. The trial court allowed defendant to call the victim and question her concerning her calling and receiving text messages from a number that she said in her civil deposition belonged to defendant, including alleged inconsistencies in phone records and her civil testimony. The victim denied sending text messages to herself purporting to be from defendant.

DISCUSSION

1.0 Substantial Evidence Supports Defendant's Convictions

Defendant argues insufficient evidence supports his conviction for unlawful sexual intercourse with the victim (count eight) and annoying a minor (count five).

" ' "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.)

1.1 *Unlawful Sexual Intercourse*

Penal Code section 261.5, subdivision (a)[1] defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a person who is not the spouse of the

[1] Undesignated statutory references are to the Penal Code.

perpetrator, if the person is a minor." As the trial court instructed: "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." (CALCRIM No. 1071; see *People v. Karsai* (1982) 131 Cal.App.3d 224, 233-234 [any penetration of female genitalia sufficient to complete crime of rape], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

Defendant does not challenge that any penetration, however slight, would complete the crime. Rather, he argues insufficient evidence supports that he actually penetrated the victim's genital area. We disagree.

The victim testified, "[W]e were attempting to have [intercourse], but it was too painful for me to continue." The victim confirmed the pain was from the *insertion* attempt, not from just touching. She also confirmed that defendant was attempting to insert his penis into her *vagina* at the time of her pain. The victim felt pain for some time after and bled as a result of this attempt. Further, the People's expert, Dr. Vickers, testified that any penetration beyond the lips of the majora labia would constitute penetrating the victim's internal genitalia.

Under these circumstances, the jury could have rationally concluded defendant's attempt to place his penis in the victim's vagina succeeded in penetrating the majora labia, causing pain and bleeding (regardless of whether he successfully penetrated her vaginal opening). This is substantial evidence of sexual intercourse, supporting the jury's verdict.

1.2 *Annoying a Minor*

"[A] violation of Penal Code section 647.6, subdivision (a) requires proof of the following elements: (1) the existence of objectively and unhesitatingly irritating or annoying conduct; (2) motivated by an abnormal sexual interest in children in general or a specific child; (3) the conduct is directed at a child or children, though no specific child or children need be the target of the offense; and (4) a child or children are victims. (See

People v. Lopez [(1998)] 19 Cal.4th [282,] 286, 291; *People v. Shaw* [(2009)] 177 Cal.App.4th [92,] 102-104.) This interpretation of the statute is consistent with the language of Penal Code section 647.6, subdivision (a)(1) and its underlying purpose—'protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.' " (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396, fn. omitted.)

Defendant challenges whether there is evidence that he had an abnormal sexual interest in "children," arguing his interest "was a natural and normal interest in [the victim], a 17-1/2-year-old mature young woman."[2] We reject this argument.

We first distinguish defendant's authorities discussing relationships between teens and young adults and the applicability of a defense of mistake of age. (See, e.g., *People v. Hernandez* (1964) 61 Cal.2d 529, 536 [defendant could defend against statutory rape of girl three months shy of 18 on basis that he reasonably believed she was 18, but recognizing "consent by even a sexually sophisticated girl known to be less than the statutory age is [not] a defense"].) These cases are inapposite to defendant, a 33-year-old man and teacher, who knew the age of his student victim.[3]

We likewise concur with *People v. Shaw*, *supra*, 177 Cal.App.4th at pages 102 to 103 that, under these circumstances, "there can be no *normal* sexual interest in any child"

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[2] We likewise reject defendant's argument contained within a single sentence that his conduct was not objectively irritating or disturbing. Defendant's failure to demonstrate error in thorough reasoned argument forfeits this argument. (See *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045, fn. 1.)

[3] We need not and do not decide whether the statute could be lawfully applied to a relationship between high school sweethearts. (See *People v. Lopez*, *supra*, 19 Cal.4th at p. 298, fn. 3 [noting narrow focus of statute "would appear to place beyond the statute's purview any normal sexually motivated conduct, not otherwise prohibited, between an 18-year-old high school senior and his or her 16- or 17-year-old sweetheart."].)

even where that child may be characterized as " 'close to adulthood.' " (*Ibid*. [rejecting the defendant's argument that his interest was in 16-year-old girl and thus not a sexual interest in "children"].) A contrary interpretation would be inconsistent with the statute itself, which proscribes conduct related to a child under the age of 18. (§ 647.6.) It is also contrary to the statute's underlying purpose, the protection of children from sexual offenders.[4] (*People v. Phillips*, *supra*, 188 Cal.App.4th at p. 1396.) This is consistent with case law enforcing section 647.6 against conduct motivated by a lewd intent towards children in high school. (See, e.g., *Phillips*, *supra*, at p. 1397 [defendant masturbating in front of a high school on a school day at dismissal time]; *People v. Shaw*, *supra*, 177 Cal.App.4th at pp. 96, 102 [sexual questioning and touching of 16-year-old girl]; *People v. Carskaddon* (1959) 170 Cal.App.2d 45, 46 [sexually explicit questions posed to 17-year-old girl].)

Here, the victim was a child under the law and ample evidence exists that defendant (her teacher and a 33-year-old man) had a lewd intent when he began grooming her for a sexual relationship through text messages which began with him calling her "baby" and telling her that she "[brought] out the pimping in [him.]" As things advanced, the content of the texting became more inappropriate, with defendant demanding that for their relationship to progress, the victim would have to prove she was a woman by doing womanly things. Starting in October, they exchanged provocative photos, including defendant sending nude photographs of himself. Given this evidence, the jury could reasonably find that defendant violated section 647.6, subdivision (a).

Nothing in *People v. Maurer* (1995) 32 Cal.App.4th 1121 alters this result; in fact, it supports it. In *Maurer*, the court determined whether the trial court's error in failing to

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[4] The same holds true for defendant's summary argument that the defense of consent should apply given the circumstances of this case. We concur with CALCRIM No. 1122 that consent is not a defense.

exclude the section 647.6 offense from the general motive instruction was harmless. (*Maurer*, *supra*, at pp. 1127-1128.) Here, the trial court did not make this instructional error. Nonetheless, the analysis in *Maurer* supports upholding defendant's conviction because it recognized that if the *Maurer* defendant (a former high school music teacher) had been unquestionably *sexually* motivated in his interactions with his students, the instructional error would have been harmless, but it was not because a plausible nonsexual motivation existed. (*Id*. at pp. 1124-1125, 1130-1131; see *id*. at p. 1131 [noting the defendant and victim were confidants and that "defendant never touched her in a sexual manner and never tried to seduce her"].)

2.0 Detective Rafiq's Testimony

Defendant also complains certain testimony stricken by the trial court was so prejudicial that it violated his rights to "due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments and their California counterparts . . . " requiring reversal.

On cross examination, the following exchange occurred between defense counsel and Detective Rafiq:

"[DEFENSE COUNSEL:] Okay. You said that you looked up [defendant] in order just to find out how to get ahold of him or what he looked like.

"I just wanted to clear that up. He has no criminal record, correct, that you saw? As far as when you did a DMV check, you are just doing the Department of Motor Vehicles regular check, that's the check you are doing?

"[DET. RAFIQ:] I also do a criminal check, yes.

"[DEFENSE COUNSEL:] But you were referring to the Department of Motor Vehicles?

"[DET. RAFIQ:] Yes, the photo I looked at. I saw two photos. One photo was one from [the] Department of Motor Vehicles and then another photo from a criminal investigation."

Defense counsel asked to approach, and the court stopped the proceedings for a break. Thereafter, the parties and court discussed what to do with the witness's mention of a photo from a "criminal investigation." Defense counsel moved for a mistrial on the basis that a motion in limine excluding discussion of any past arrests had been violated and/or that counsel had committed ineffective assistance of counsel in eliciting the testimony. Alternatively, counsel asked that the entirety of the cross-examination questioning concerning DMV photos be stricken.

The trial court denied the motion for mistrial and granted the request to strike the entirety of the cross-examination. The trial court brought the jury back and immediately instructed them: "Ladies and gentlemen, just before we recessed for our midafternoon break, you heard a line of questioning concerning a records check that Detective Rafiq may have conducted to obtain a photograph of the defendant, Mr. Wallace. I am going to order you to disregard that testimony. It is stricken from the record, and you are not to consider the question by [the defense attorney] and the witness'[s] responses in any respect."

This instruction was reinforced after closing arguments (wherein there was no mention of any criminal history or previous investigation, when the trial court stated, "If I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose." The trial court further instructed the jury on its duty to decide the facts and that it must follow the law as explained by the court, even if the jury did not agree.

We presume the jury followed the court's instruction. (*People v. Case* (2018) 5 Cal.5th 1, 37.) Under these circumstances, defendant cannot show he was prejudiced

by the alleged ineffective assistance of his counsel in eliciting the answer that Detective Rafiq saw a picture associated with a criminal investigation of an unknown character/origin. (*Strickland v. Washington* (1984) 466 U.S. 668, 694, 697 [80 L.Ed.2d 674, 698, 700].)

3.0 The Subpoenaed Records

Finally, defendant requests this court independently review subpoenaed school records to determine whether the trial court erred in not releasing all of them after its in camera review. The People do not oppose this request. Having reviewed the subpoenas, a transcript of the hearing on the subpoenaed records, and the associated confidential, subpoenaed materials reviewed by the trial court, we conclude the trial court made the correct determinations concerning the production of these documents. Accordingly, the trial court did not err in refusing to produce portions of the requested information.

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.